Supreme Court, U.S.
FILED

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NO. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1996

M. A. BAHETH A/K/A,
M. ALLAM BAHETH; BAHETH
RESEARCH & DEVELOPMENT
LAB., AND BAHETH ENVIRONMENTAL
& ANALYTICAL TESTING LAB., LTD.
AND M. A. BAHETH & CO., INC.

PETITIONERS

VERSUS

GUARANTY BANK AND TRUST COMPANY,
NOW KNOWN AS REGIONS BANK;
CHUCK DABADIE; CHRIS POPE AND
FRANK CLARK

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

1. Whether the court of appeals for the Fifth Circuit erred in affirming the district court's erroneous grant of a motion to dismiss for failure to state a cause of action when it was not determined that petitioners could prove no set of facts in support of their claims which would entitle them to relief, especially given the early stages of the proceeding; and the fact that the defendants have never filed an answer ;

2. Whether the court of appeals for the Fifth Circuit erred in affirming the district court's ruling that petitioners' state court actions had prescribed without proper application of the doctrine of contra non-valentem.

PARTIES TO THE PROCEEDING

The petitioners are, M.A. Baheth, in his individual capacity, and in his capacity as the president of M.A. Baheth Research & Dev. Lab., Inc., M.A. Baheth & Co., Inc. Baheth Environmental and Analytical Testing Lab., Ltd., domestic corporations organized under the laws of the State of Louisiana.

The respondents are, Guaranty Bank & Trust Company, now known as Regions Bank, a banking institution and Chuck Dabadie, Chris Pope and Frank Clark who were officers of Guaranty Bank and Trust Co., now known as Regions Bank.

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1996

M. A. BAHETH A/K/A,
M. ALLAM BAHETH; BAHETH
RESEARCH & DEVELOPMENT
LAB., AND BAHETH ENVIRONMENTAL
& ANALYTICAL TESTING LAB., LTD.
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NOW KNOWN AS REGIONS BANK;
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RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, M.A. Baheth AKA as M. Allam Baheth; Baheth Research & Dev. Lab., Inc.; Baheth Environmental and Analytical Testing Lab., Ltd., and M.A. Baheth & Co., Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit filed on October 7, 1996, in M.A. Baheth AKA as M. Allam Baheth Baheth; Research & Dev. Lab., Inc.; Baheth Environmental and Analytical Testing Lab., Ltd., and M.A. Baheth & Co., Inc. v. Guaranty Bank & Trust Company, now known as Regions Bank, Chuck Dabadie, Chris Pope and Frank Clark, No. 95-31252 is unreported and reprinted at App.A, infra., p. App. 1.

The opinion of the United States District Court for the Middle District of Louisiana in M.A. Baheth , AKA as M. Allam Baheth Baheth Research & Dev. Lab., Inc., Baheth Environmental Testing and Analytical Lab., Ltd., and M.A. Baheth & Co., Inc., v. Guaranty Bank & Trust Company, now known as Regions Bank, Chuck Dabadie, Chris Pope and Frank Clark, No. 95-96-B-1 is unreported and reprinted at App. B, infra., p. App. 3.

BASIS OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was enter October 8, 1996. (App. A, infra., page App. 1). Under the Rules of this Honorable Court, this Petition for Writ of Certiorari is timely filed within 90 days after entry of the judgment of the United States Court of Appeals for the Fifth Circuit.

The Jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant statutory and other provisions involved are:

(a) Rule 12(b)(6) which provides that:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or cross-claim, or

third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person (3) improper venue (4) insufficiency of process, (5) insufficiency of service of process (6) failure to state a claim upon which relief can be granted (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in an responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party may assert at the trial any defense in law or fact to that claim for relief, If, on motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(B) 12 U.S.C. 1972 (3) which provides that:

A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on condition or requirement...

(3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service.

STATEMENT OF THE CASE

This case involves a claim of violation of The Bank Tying Act by petitioners who were long time customers of the re-

spondent bank. Petitioners, M. A. Baheth A/K/A, M. Allam Baheth; Baheth Research & Development Lab., and Baheth Environmental & Analytical Testing Lab., Ltd. And M. A. Baheth & Company Inc., filed a complaint alleging various banking violation against, Regions Bank, Formerly Guaranty Bank (hereinafter referred to as "Guaranty"), and Chuck Dabadie, the former president of the bank, Chris Pope, senior vice president of the bank and petitioner's loan officer and Frank Clark, a vice president of the bank on January 30, 1995. (App. H, infra., page App. 30).

Guaranty filed motion to dismiss the complaint on basis that the complaint fail to state a cause of action regarding violation of the Tie-In Amendments to the Bank holding company Act of 1956, 12 U.S.C. 1972. Guaranty also claimed that the various averments in the complaint were based on tort action, therefore under Louisiana Law governed by one year prescriptive period.

Respondents were allowed to file a supplemental memorandum in which they alleged that the Plaintiffs failed to "explain" how the bank tied in the loans. Petitioners filed opposition to the supplemental memorandum for motion to dismiss and clarified the factual basis.

Petitioners' memorandum in response to Defendants' Supplemental Memorandum, explained how the defendants referred to the debts of the various corporations as "the household of debt of Mr. Baheth" and how the bank's officer explained that: "...his corporations were reworked and restructured, including, loans being restructured with certain related companies undertaking payments of some of the debt and/or guaranteeing the debt and/or pledging assets to secure the debt, and the use of. Cross guarantees, cross collateralization and cross defaults...."

On November 2, 1995, the district court granted defendants' motion to dismiss, based on the reasons contained in the recommendation of the magistrate judge. (App. B, infra, page App. 3). The magistrate judge recommended that the motion to dismiss be granted on grounds that plaintiffs failed to state a tying claim under The Bank Tying Act, reasoning that plaintiffs alleged nothing more than plaintiffs Baheth and Co., were required to post additional security in order for Guaranty to continue to provide a line of credit for the Construction Company. That this was not unusual in the banking industry. Moreover, that there was no factual allegation that the bank would benefit in any way from allegedly requiring Baheth to provide additional protection for the loan to the construction company. (App. C , infra., page App. 4).

The Fifth Circuit's judgment was that it did not find manifest error in the ruling of the district court and affirmed based on that ruling. (App. A, infra., page App. 1).

REASON FOR GRANTING THE WRIT

The court of appeals erroneously affirmed the district court's grant of the motion to dismiss for failure to state a cause of action; and that petitioners' state law claims were prescribed.

1. THE LAW OF RULE 12(B)(6) MOTIONS

The motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted A complaint should not be dismissed on a Rule 12(b)(6) motion for failure to state a claim, unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Boudeloche v. Grow Chemical Coatings Corp.*, 728 F. 2d 759, 762 (1984); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F. 2d 1568 (5th Cir. 1988); *E.G., Barrientos v. Reliance Standard*

Life Ins. Co., 911 F. 2d 1115, 1116 (5th Cir. 1990), cert. denied,— U..S.—, 111 S.Ct. 795, 112 L.Ed. 2d 857 (1991), (quoting *Baton Rouge Bldg., & Constr. Trade Council v. Jacobs Construction, Inc.*, 804 F. 2d 879, 881 (5th Cir. 1986).

It has not been shown, based on the arguments and pleadings, that it appears beyond a doubt that plaintiffs could prove no set of facts which would entitle them to relief. The events described above as the reworking and restructuring of certain loans on May 12, 1992, involved alleged loans of M.A. Baheth Construction Co., Inc., whose debt, through alleged trickery and deceit, were tied to M.A. Baheth & Company, Inc., a completely separate corporation, by use of a promissory note. The promissory note was cleverly disguised as a loan to M.A. Baheth and Company, Inc., on May 12, 1992, in the original amount of $500,000. In addition, the alleged reworking a loan of residential property in the name of Bakan, Ltd., tied to a new loan in the amount of $235,000.00 which had a balance by the bank's records of $150,000. The affidavit of M. A. Baheth was attached in support of petitoners' appeal to the Fifth Circuit, a copy is reprinted as App. G, infra., page App. 21. Yet, the bank cannot explain what happened to the difference in the balance on the residential loan and the refinanced amount. In all instances of alleged loans, no money exchanged hands. The actions of the bank can hardly be characterized as usual banking practices, these actions are beyond unusual, they are unbelievable and shocking. Moreover, all transactions occurred on the same date without so much as a board meeting.

Notwithstanding, the Magistrate's conclusion that plaintiffs alleged "...no more than that plaintiffs, Baheth and Baheth and Co. were required to post additional security in order for the Guaranty to continue to provide a line of credit for the construction company...." and that "...there is no factual allegation which can even be construed to contend that Guar-

anty's making those requirements was unusual in the banking industry...." plaintiffs alleged and maintain that Guaranty received many benefits from their actions. The benefits Guaranty bank received were numerous, for example, the bank determined where and if funds would be applied; the bank repossessed the residential property which note was allegedly reworked; the bank seized and sold cars with zero "0" balances; the bank seized 42 acres of undeveloped land; the bank liquidated personal stock and can not account for the proceeds; the bank refinanced alleged debts in the name of new companies with new loan numbers, but cannot account for the difference in the old balances and refinanced amount. Clearly, the bank has been unjustly enriched.

The complicated issues in this case, coupled with the fact that many facts remain concealed by the bank, dictates that the only way justice could be had is to allow petitioners the opportunity to have the complaint answer, conduct discovery and offer evidence to support their claims.

A Rule 12(b)(6) motion functions to test the formal sufficiency of the complaint against the liberal pleading requirements of Rule 8(a). Consistent with Rule 8(a), a pleading need only furnish a short and plain statement of the claim showing that the pleader is entitled to relief. Fed R. Civ. P. Rule 8(a). "The issue is not whether a plaintiff will ultimately prevail but whether claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974); *Estate of Bailey v. County of York*, 768 F. 2d 503, 506 (3d Cir. 1985). A complaint should not be dismissed under 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed. 2d 80 (1957). In evaluating whether dismissal is proper, "factual allegations of the com-

plaint are to be accepted as true," and "[r]easonable inferences will be drawn to aid the pleader." *D.P. Enter., Inc. v. Bucks County Community College*, 725 F. 2d 943, 944 (3d Cir. 1984).

In order to institute suit under Section 1972, Title 12 of the United States Code, the person must have been injured in his business or person by reason of anything forbidden in that Section. 12 U.S.C. Section 1975.

At the pleading stage, a plaintiff must plead three things to recover under the anti-tying provision of Section 1972: first, the plaintiff must show that the banking practice in question was unusual in the banking industry; second, plaintiff must show an anti-competitive tying arrangement; and third, plaintiff must demonstrate that the practice benefited the bank. *Rae v. Union Bank*, 725 F. 2d 478 (9th Cir. 1984); *Pappas v. NCNB National Bank of North Carolina*, 653 F. Supp. 699 (M.D. N.C. 1987).

In *Nesglo, Inc. v. Chase Manhattan Bank, N.A.*, 506 F. Supp. 254 (D.P.R. 1980), the court dealt with several claims including that the defendants had violated the provision of certain federal banking laws, the most prominent, the anti-tie-in provision. The court concluded that the pleading specifically did not show or point out facts to constitute a violation of Section 1972. Further, that the pleading contained ultimate conclusory statements, for example, the pleading alleged that Chase conditioned the extensions of credit with additional burdensome impositions, which were not described, but nevertheless characterized as part of a supposed conspiracy, having as its goal Chase's unjust enrichment. *Id.* at 257.

In this case, the plaintiffs have alleged underpinning facts concerning conditions surrounding refinancing agreements with the bank in connection with the extension of credit in which plaintiffs were required to provide additional security and property, not usually connected with a loan.. (App.H, infra., page App.30). Further, that the bank benefited by being

unjustly enriched can be implied for pleading purposes. *Swerdloff v. Miami Nat. Bank*, 584 F. 2d 54 (5th Cir. 1978).

Thus, plaintiffs should be given an opportunity to support, through discovery, their contentions that Guaranty Bank's refinancing agreements are anti-competitive tying agreements.

2. UNDER LOUISIANA LAW THE BANK HAD A FIDUCIARY DUTY

Ordinarily a bank and deposition have a debtor-creditor relationship with no independent duty of care imposed on the bank. Further, special circumstances must exist before a special duty arises. *Greene v. Gulf Coast Bank*, 593 So. 2d 632 (LA. 1992).

In *Trans-Global Alloy Limited v. First National Bank of Jefferson Parish*, 583 So. 2d 443 (La. 1991), the Supreme Court of Louisiana found that due to its role as pledgee, the bank had a fiduciary obligation to protect a customer's collateral.

In this case, the bank was granted a power-of- attorney on behalf of M.A. Baheth Construction Co., Inc., in connection with a contract assigned to the bank. In addition, Guaranty was the assigneee of all the collateral of all entities which Mr. Baheth was associated. Moreover, Guaranty, through interbanking transactions controlled funds which were to be applied to the various notes. (See, App. G, infra., page App. 23).

Guaranty through its alleged cross guaranties, cross pledges and cross-collateralization treated the various entities as one. Therefore, the fact that M.A. Baheth Construction Co., is not a party to this action does not alter the facts and results of the banks actions. In this case, the relationship between Baheth and the various entities with the bank and the actions of the bank certainly indicate the existence of special circumstances which gave rise to a special duty on part of the bank to protect the collateral of the petitioners.

3. PETITIONERS' STATE ACTIONS NOT PRESCRIBED

In *Johnson Controls, Inc. v. Lynch*, 633 So. 2d 212, (Ct. App. 1st Cir. 1993), the Louisiana's First Circuit of Appeals held that fraudulent or intentional concealment or misrepresentation is required for doctrine of contra non valentum to suspend the running of prescription on ground that the debtor in that case had done some act effectively to prevent the creditor from availing itself of a cause of action.

However, in this case, we have the creditor who fraudulently and/or intentionally concealed information and misrepresented the truth. (See, App. G, infra., page App. 21). Baheth could not have known of the bank's failure to apply funds to the various accounts. *Id.* On numerous occasions prior to the bank taking any actions against the debtors or the guarantors, Mr. Baheth had requested copies of note transcript statements on the various accounts. *Id.* pp. 26-27

It was not until October 17, 1994, that Mr. Baheth obtained a copy of the payment histories of the alleged debts of the various entities, which had been provided to Mrs. Samera Abide, trustee in the Bakan, Ltd.'s, bankruptcy. (App. E, infra, p. App. 14).

Nonetheless, prescription of one year which applies to ex delictu tort claims cannot apply to the action here for breach of promise. As such damages would arise ex contractu governed by 10 years prescription. La. Civil Code. Art. 3499. In the case at bar, the plaintiffs had entered into continuing guarantee contracts, pledge agreements and commercial guarantee agreements with the bank, therefore, not prescribed.

4. FRAUD AND MISREPRESENTATION, NEGLIGENT ADMINISTRATION OF LOANS, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND FRAUDULENT NON-DISCLOSURE

About November 1993, Guaranty began filing suits against the guarantors on the various loans that has been signed May 12, 1992. However, Guaranty Bank did not attach a copy of the loan histories to those suits as proof of the alleged debt. It was not until October 17, 1994, when Mrs. Abide, a Chapter 7 bankruptcy trustee obtained a copy of the loan payment histories, did petitioner discover that the payment histories revealed several accounts had zero "0" balances. Suit in this case was filed January 30, 1995. *Id.*

Under the doctrine of *contra non-valentem,* prescription does not begin to run until the plaintiff knows sufficient facts and has a reasonable basis for filing suit against a certain defendant. *Jordan v. Employee Transfer Corp.,* 509 So. 2d 420 (La. 1987). Petitioners contend that under the circumstances, they did not have sufficient facts to form a reasonable basis for filing suit until these facts were discovered, thus, not prescribed. Prescription did not begin to run until October 17, 1994, suit was filed January 30, 1995, therefore timely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:
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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31252
Summary Calendar

M.A. BAHETH, also known as M. Allam Baheth; BAHETH RESEARCH & DEVELOPMENT LAB; M.A. BAHETH & CO., INC.; BAHETH ENVIRONMENTAL & ANALYTICAL TESTING LAB, LTD.,

Plaintiffs-Appellants,

versus

GUARANTY BANK AND TRUST COMPANY, also known as Regions Bank of Louisiana; CHUCK DABADIE; CHRIS POPE; FRANK CLARK,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. CA-95-96-M-A

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM:*

Appellants M.A. Baheth, also known as M. Allam Baheth; Baheth Research & Development Lab; M.A. Baheth & Co., Inc.; and Baheth Environmental & Analytical Testing Lab, Ltd., appeal the district court's judgment dismissing their federal claims pursuant to the antitying provisions of the Bank Hold-

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in in Local Rule 47.5.4.

ing Company Act, 12 U.S.C. §§ 1972 and 1975, for failure to state a claim under Fed. R. Civ. P. 12(b)(6). They also appeal the dismissal of their state law claims based on prescription. Because appellants have failed to challenge the district court's alternative basis for the dismissal of their state law claims based on a discretionary declination of supplemental jurisdiction, these claims are considered abandoned. *See Weaver v. Puckett*, 896 F. 2d 126, 128 (5th Cir.), *cert. denied*, 498 U.S. 966 (1990). We have reviewed the record and the district court's opinion and find no reversible error regarding the dismissal of the federal claims. Accordingly, we affirm for essentially the reasons given by the magistrate judge, adopted by the district court. *M.A. Baheth, a/k/a M. Allam Baheth; Baheth Research & Development Lab, and Baheth Environmental & Analytical Testing Lab, Ltd. and M.A. Baheth & Co., Inc. v. Guaranty Bank & Trust Company, et al.*, C.A. No. 95-96-B-1 (M.D. La. Nov. 3, 1995).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

M.A. BAHETH A/K/A M. ALLAM BAHETH; BAHETH RESEARCH & DEVELOPMENT LAB.; AND BAHETH ENVIRONMENTAL & ANALYTICAL TESTING LAB., LTD. AND M.A. BAHETH & CO., INC.

CIVIL ACTION NO. 95-96-B-1

VS.

JUDGE MELANCON

GUARANTY BANK & TRUST COMPANY, ET AL

MAGISTRATE JUDGE SIMON

JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein and after an independent review of the entire record and the written objections filed herein, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED, ADJUDGED AND DECREED that the motion to dismiss filed by the defendants under F.RCiv.P. 12 (b) (6) is GRANTED and that the above entitled and numbered complaint is hereby DISMISSED for failure to state a claim upon which relief could be granted.

JUDGMENT RENDERED AND SIGNED, in chambers, at Monroe, Louisiana, on this 2nd day of November, 1995.

s/ TUCKER L. MELANÇON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

M. A. BAHETH A/K/A
M. ALLAM BAHETH; BAHETH
RESEARCH & DEVELOPMENT LAB.,
AND BAHETH ENVIRONMENTAL &
ANALYTICAL TESTING LAB., LTD.
AND M.A. BAHETH & CO., INC.

CIVIL ACTION
VERSUS **NO. CV95-96-B-1**

GUARANTY BANK & TRUCT COMPANY, ET AL
JUDGE MELANÇON
MAGISTRATE JUDGE SIMON

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the Court is a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), which was filed by all of the defendants herein. That motion has been referred to me for a report and recommendation.

This is a suit by an individual, M. A. Baheth a/k/a M. Allam Baheth ("Baheth") and three of his corporations, Baheth Research & Development Lab., Baheth Environmental & Analytical Testing Lab., Ltd., and M. A. Baheth & Co., Inc., against the Guaranty Bank & Trust Company ("Guaranty"), now known as Regions Bank, and three of its officers, Chuck Dabadie, Chris Pope and Frank Clark.

The complaint attempts to state six claims for relief, as follows:

1. Violation of the Bank Tying Act, 12 U.S.C. §1971, et seq.
2. Breach of fiduciary duty.
3. Fraud and misrepresentation.
4. Negligent administration of loans.
5. Intentional infliction of emotional distress.
6. Fraudulent non-disclosure.

The plaintiffs allege that because of the conduct of the defendants set forth in the complaint, "The plaintiffs lost their life savings and future investments, past and future income, suffered damage to their professional and personal reputation, suffered emotional distress, suffered damage to their banking relationship with Guaranty Bank and other lending institutions, and ultimately bankrupted three companies, suffered many unjustified lawsuits and judgments, all their damages in the amount of TWENTY MILLION DOLLARS."

The Law of Rule 12(b)(6) Motions

A motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted. *Tanglewood East Homeowners v. Charles-Thomas. Inc.*, 840 F.2d 1568, 2572 (5th Cir. 1988); *Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1101 (5th Cir. 1985). For the purposes of such a motion, the factual allegations of the complaint must be taken as true, and any ambiguities must be resolved in favor of the pleader.[1] *Doe*, 753 F.2d at 1101. A motion to dismiss an action for failure to state a claim admits the facts alleged in the

[1] The plaintiffs' first memorandum in opposition to the motion to dismiss, the defendants' supplemental memorandum in support of their motion, and the plaintiffs' response to the defendants' supplemental memorandum all contain a large number of exhibits. However, those exhibits will be excluded by the Court at this time and will not be considered in deciding the motion before the Court, as I find it would be inappropriate to treat the motion as one for summary judgment at this time. (See Rule 12(b)).

complaint, but challenges plaintiff's right to relief based upon those facts. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995). In particular, a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Hirra v. National Railroad Passenger Corp.*, 10 F.3d 1142, 1144 (5th Cir. 1994); *Doe*, 753 F.2d at 1102. On a motion to dismiss, we presume that general allegations embrace the specific facts that are necessary to support the claim. *National Organization for Women Inc. v. Scheidler*, _____U.S._____ 114 S.Ct. 798, 803, 127 L.Ed.2d 99 (1994), citing *Lujan v. Defenders of Wildlife*, _____U.S._____, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992).

Alleged Violation Of The Bank Tying Act

The Bank Tying Act, 12 U.S.C. §1972(3), prohibits a bank from conditioning credit upon the requirement that "the customer provide some additional credit, property, or service" to the bank other than that "usually provided in connection with a loan...." Section 1975 provides that "[a]ny person who is injured in his business or property" by a violation of that prohibition may sue for three times the damages sustained plus costs and attorneys fees. 12 U.S.C. §1975. See *Swerdloff v. Miami Nat. Bank*, 584 F.2d 54, 57 (5th Cir. 1978).

The parties agree that a plaintiff must plead and prove three things to recover under the quoted Anti-Tying provisions: (1) plaintiff must show that the banking practice in question was unusual in the banking industry, (2) plaintiff must show an anti-competitive tying arrangement, and (3) plaintiff must demonstrate that the tying practice benefited the bank. *Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984).

The plaintiffs' only material allegation under its Tying Act claim is that on or about May 12, 1992, the defendant bank required M. A. Baheth and Co., Inc. (hereinafter "Baheth Co."), to assume the debt of the M. A. Baheth Construction Co., Inc.

(hereinafter "Baheth Construction" or "the Construction Company"), and that Mr. M. A. Baheth was coerced into signing continuing guarantees and commercial guarantees on behalf of every company he was associated with, even corporations he did not own, in addition to pledge of receivables and personal stock and certificates of deposit which were used as additional security for the line of credit for the Construction company's debt and for an alleged loan of $235,000.00.

Even giving those allegations the inferences to which they are entitled, they allege no more than that plaintiffs Baheth and Baheth and Co. were required to post additional security in order for Guaranty to continue to provide a line of credit for the construction company. There is no factual allegation which can even be construed to contend that Guaranty's making those requirements was unusual in the banking industry, and plaintiffs have cited no case or other authority holding that requiring additional security in order to continue a line of credit is an unusual banking practice. Moreover, there is no factual allegation that the bank would benefit in any way from its alleged requirement that Baheth provide additional security, other than to get additional protection for its loans to the construction company. *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984).

Additionally, no tying claim can be stated against the individual defendants because 12 U.S.C. §1972 only refers to a bank, and not to any natural persons. See *Rae, supra*, and *Nesglow. Inc. v. Chase Manhatten Bank N.A.*, 506 F.Supp. 254, 265 (D.P.R. 1980).

For the foregoing reasons, I find that the plaintiffs have failed to state a claim against any of the defendants under the Bank Tying Act.

Breach of Fiduciary Duty

This is a state law claim which basically contends that de-

fendant Pope owed the plaintiffs a fiduciary duty because Baheth had established a banking relationship with Pope, had relied on Pope's advice, had signed documents in May of 1992 at Pope's request without reading the documents, and because Pope made decisions as to how money coming in from and on behalf of the Construction Company to the bank would be applied to pay on the bank's various loans to Baheth's businesses.

Plaintiffs admit that a creditor-debtor relationship does not normally impose an independent duty of care on the part of the creditor, but they contend that relationship may give rise to such a duty in certain circumstances, citing *Greene v. Gulf Coast Bank*, 593 So.2d 632 (La. 1992) and *Trans-Global Alloy Ltd. v. First Nat. Bank of Jefferson Parish*, 583 So.2d 443 (La. 1991). Plaintiffs point out that in the *Trans-Global* case, the Louisiana Supreme Court held that due to its role as pledgee, the bank had a fiduciary obligation to protect the customer's collateral.

Plaintiffs contend *in their brief* that in the case at bar, Guaranty was granted a power of attorney of behalf of M. A. Baheth Construction Co., Inc. in connection with a contract assigned to the bank, and that, in addition, Guaranty was the assignee of all of the collateral of all entities with which Mr. Baheth was associated, and that Guaranty also, through inter-banking transactions, controlled funds which were to be applied to the various notes.

However, there is nothing in any of the paragraphs of the complaint under the claim of breach of fiduciary duty that alleges anything about M. A. Baheth Construction Co., Inc. (not a party in this proceeding) having granted a power of attorney to Guaranty or that Guaranty is the assignee of all of the collateral of all entities with which Mr. Baheth was associated. There is an allegation that Guaranty controlled funds which were to be applied to the various notes, but there is no allegation of

any facts which would show that Pope or Guaranty applied those funds in breach of any duty that they may have had with regard to the funds' application.

In their latest brief, the plaintiffs argue that Guaranty was the pledgee of all equipment and furniture of the various corporations, and that the bank also held a pledge and assignment of several contracts in the name of the construction company. The complaint alleges none of this. The complaint's only reference to pledge is in Paragraph 10 which states that M. A. Baheth was required to pledge Governmental contracts of over $4 million dollars for a line of credit for the construction company. Even broadly construed, however, there is no allegation that Guaranty failed to protect the pledged government contracts.

The defendants point out that La. R.S. 6:1124, enacted in 1991, provides, in pertinent part:

> "No financial institution or officer or employee thereof shall be deemed or implied to be acting as a fiduciary, or have a fiduciary obligation or responsibility to its customers or to third parties other than shareholders of the institution, unless there is a written agency or trust agreement under which the financial institution specifically agrees to act and perform in the capacity of a fiduciary. The fiduciary responsibility and liability of a financial institution or any officer or employee thereof shall be limited solely to performance under such a contract and shall not extend beyond the scope thereof. Any claim for breach of a fiduciary responsibility of a financial institution or any officer or employee thereof may only be asserted within one year of the first occurrence thereof. This section is not limited to credit agreements and shall apply to all types of relationships to which a financial institution may be a party."

Additionally, §2 of the Act provides as follows:

> "This Act is deemed to be clarifying in nature and shall apply to prior and now existing relationships and transactions involving financial institutions."

The defendants further point out that there is no allegation that any document was ever executed between the plaintiffs and the defendants creating a fiduciary relationship, and that all of the alleged instances of breach of fiduciary duty occurred more than one year prior to the filing of the suit, which was on January 30, 1995.

Based on the foregoing analysis, I find that plaintiffs have failed to state a claim against any defendant for breach of fiduciary duty upon which relief can be granted.

Fraud And Misrepresentation, Negligent Administration of Loans, Intentional infliction of Emotional Distress And Fraudulent Non-Disclosure

These are all state tort law claims. The defendants' only argument against these claims is that they all prescribed before this suit was filed under Louisiana's liberative prescription of one year. La. Civ. Code Art. 3492.

The plaintiffs argue that the doctrine of *contra non valentem* suspended the running of prescription because the defendants acted to effectively prevent the plaintiffs from timely availing themselves of a cause of action, citing *Johnson Controls. Inc. v. Lynch*, 633 So.2d 212 (La. App. 1st Cir. 1993). The plaintiffs contend that the defendants fraudulently and/or intentionally concealed information and misrepresented the truth, which kept Baheth from knowing "of the bank's failure to apply funds to the various accounts." Additionally, the plaintiffs contend that the prescriptive period that applies to its last four claims arose out of continuing guarantee contracts, pledge agreements and commercial guarantee agreements with the

bank, which would only be subject to the 10-year prescription for breach of contract.

Again, we must look allegations of the complaint. The only allegation concerning when the plaintiffs discovered alleged wrongful acts of the plaintiffs is found in Paragraph 3 of the complaint which alleges that the plaintiffs could not and did not discover Guaranty's fraudulent concealment of its wrongful act until suits were filed by Guaranty on the alleged continuing guaranties and commercial guaranties and alleged cross-collateralization about November, 1993.

Since the last four claims in the complaint incorporate all of the prior paragraphs as their allegations, the complaint, itself, shows that any delictual claims had prescribed by the date the suit was filed. There are no allegations in the complaint to show that the plaintiffs' claims for fraud and misrepresentation, negligent administration of loans, intentional infliction of emotional distress, and fraudulent non-disclosure are based on breach of contract.

Declination Of Supplemental Jurisdiction

If the plaintiffs' only federal claim, the bank tying claim, is dismissed, then the plaintiffs' other claims, which are all state law claims, should also be dismissed pursuant to the Court's discretion to decline to exercise supplemental jurisdiction under such circumstances 28 U.S.C. §1367. The district courts may decline to exercise supplemental jurisdiction over a state claim if "the district court has dismissed all claims over which it has original jurisdiction,..."

Conclusion

Based on the foregoing discussion, IT IS RECOMMENDED, that the defendants' motion to dismiss under F.R.Civ.P. 12(b)(6) be GRANTED.

Under the provisions of 28 U.S.C. §636(b)(1)(C), the parties have ten (10) business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 11th day of September, 1995.

s/ JOHN F. SIMON
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-31252

M.A. BAHETAH, also known as M. Allam Baheth; BAHETH RESEARCH & DEVELOPMENT LAB; M.A. BAHETH & CO., INC.; BAHETH ENVIRONMENTAL & ANALYTICAL TESTING LAB, LTD

Plaintiffs - Appellants

v.

GUARANTY BANK AND TRUST COMPANY, also known as Regions Bank of Louisiana; CHUCK DABADIE; CHRIS POPE; FRANK CLARK

Defendants - Appellees

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

Before DAVIS, BARKSDALE, and DEMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss the appeal is denied.

IT IS FURTHER ORDERED that appellees' motion for damages and costs for frivolous appeal pursuant to Rule 38, FRAP is denied.

APPENDIX E

TX/RX #: _____

BREAZEALE, SACHSE & WILSON, L.L.P.
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10/17/94
(Date)

TELECOPIER COVER SHEET

To: Seneca Wike	From: Steve Chiccarelli
Company:	Re: Bank/Bakan/Baker
Telecopier No.: 923-1443	Attorney/Client Matter: 37/3908/16695
Telephone No.: 923-1404	Number of pages including cover sheet: 12

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MESSAGE

Attached are copies of the payment histories and a summary chart of the debt. You will not need to send a runner.

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PLAINTIFF'S EXHIBIT C

BEST AVAILA

APPENDIX F

IN THE
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

CASE NO. 95-31252

M.A. BAHETH/A/K/A M. ALLAM BAHETH, ET AL

Appellants

VERSUS

GUARANTY BANK AND TRUST COMPANY, NOW KNOWN AS REGIONS BANK, ET AL

Appellees

On appeal from the United States District Court
for the Middle District of Louisiana
Honorable Tucker L. Melancon
United States District Judge Presiding

OPPOSITION TO MOTION TO DISMISS APPEAL

By Attorney
Linda Ritzie
Louisiana bar Roll No. 20342
921 N. Lobdell Ave., Ste. G
Baton Rouge, LA 70806
(504)925-0586

Attorney for appellants

BLE COPY

CERTIFICATE OF INTERESTED PERSONS

Pursuant to the requirement of Rule of the Rules of the United States Court of Appeals for the Fifth Circuit the undersigned counsel of record for Bakan, Ltd., certifies that the following listed persons have an interest in the outcome of this case.

1. Guaranty Bank & Trust Co., now Regions Bank
   5353 Essen Ln.
   Baton Rouge, LA 70809
2. Chris Pope
   5353 Essen Ln.
   Baton Rouge, LA 70809
3. Frank Clark
   5353 Essen Ln.
   Baton Rouge, LA 70809
4. M.A. Baheth
   45859 Broadview Station
   Baton Rouge, LA 70895
5. Baheth Research and Development Lab
   45859 Broadview Station
   Baton Rouge, LA 70895
6. Baheth Environmental & Analytical Testing Lab., Ltd.
   45859 Broadview Station
   Baton Rouge, LA 70895
7. Paul Hebert & Stephen Chicarelli
   Attorneys for Guaranty Bank and Trust Co., et al
   P.O. Box 3197
   Baton Rouge, La. 70821-3197
8. Michael Lemoine, Attorney for defendants
   P. O. Box 3448
   Lafayette, LA 70502

9. Linda Ritzie, Attorney for the Plaintiffs / Appellants
   921 N. Lobdell Ave., Ste. G
   Baton Rouge, La. 70806

Linda Ritzie, Attorney for Appellants

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

CASE NO. 95-31252

M.A. BAHETH/A/K/A M. ALLAM BAHETH, ET AL

Appellants

VERSUS

GUARANTY BANK AND TRUST COMPANY, NOW KNOWN AS REGIONS BANK, ET AL

Appellees

On appeal from the United States District Court
for the Middle District of Louisiana
Honorable Tucker L. Melancon
United States District Judge Presiding

OPPOSITION TO MOTION TO DISMISS APPEAL

NOW INTO COURT, through undersigned counsel, come plaintiffs/appellants, M.A. Baheth, a/k/a M. Allam Baheth, Baheth Research & Development Lab., Baheth Environmental & Analytical Testing Lab., Ltd., and M. A. Baheth & Co., Inc., who respectfully file this opposition to defendants/appellees', Guaranty Bank & Trust Company, now known as Regions Banks of Louisiana, Motion to Dismiss Appeal, and represent as follows:

1.

Defendants have failed to show that it appears to a certainty that the plaintiffs can prove no set of facts in support of their federal and state claims dismissed pursuant to rule 12 (b) (6).

2.

Defendants have relied on cases in which the facts significantly differ from the facts of this case.

3.

Any restated arguments briefed on appeal are supported by reasonable arguments for altering or reversing the district court's judgment.

4.

Plaintiffs' complaint does not allege that any individual defendant violated the Bank Tying Act.

5.

Baheth' s appeal is not without merit, nor has the defendants presented any evidence or example to support their statement that "with respect to Guaranty Bank, this appeal is wholly without merits and represents nothing more than unsubstantiated conclusions previously rejected by the district court."

6.

At this posture of the case, the plaintiffs were not required to substantiate their claims, but to allege sufficient facts in order to withstand a rule 12 (b) (6) dismissal.

7.

The standard of review to be applied to a dismissal of federal and state claims dismissed pursuant to a rule 12 (b) (6) dismissal is the same: it must appear to a certainty that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief.

WHEREFORE, for the above and foregoing reasons, and as is more fully set forth in the attached memorandum and affidavit of M. A. Baheth in support, of plaintiffs/appellants opposition to Motion to Dismiss Appeal, respectfully pray that defendants/appellees motion to dismiss be denied at their costs.

By Attorney:
s/ Linda Ritzie
Louisiana bar Roll No. 20342
921 N. Lobdell Ave., Ste. G
Baton Rouge, LA 70806
(504) 925-0586

Attorney for appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Opposition to Motion for Damages and Costs for Frivolous Appeal has this day been mailed, postage prepaid and properly addressed, to Paul Hebert, Attorney for Guaranty Bank and Trust Co, 23rd Floor One America Place, P. O. Box 3197, Baton Rouge, LA 70821-3197 and Michael Lemoine, P. O. Box 3448, Lafayette, LA 70502.

Baton Rouge, Louisiana, this 6th day of March 1996

s/ Linda Ritzie

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

M.A. BAHETH A/K/A,	*
M. ALLAM BAHETH; BAHETH	*
RESEARCH & DEVELOPMENT	*
LAB., & BAHETH ENVIRONMENTAL &	*
ANALYTICAL TESTING LAB., LTD.	**CASE NO. 95-96-B-1**
AND M.A. BAHETH & CO., INC.	*
	*
	COMPLAINT
	*
VERSUS	*
	*
GUARANTY BANK AND TRUST CO.,	*
CHUCK DABADIE; CHRIS POPE	*
AND FRANK CLARK	*

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

AFFIDAVIT OF M.A. BAHETH

BEFORE ME, the undersigned Notary Public, on the date set forth herein below, personally came and appeared:

M.A. BAHETH, President of Baheth ET AL, and in his Individual Capacity;

who after being duly sworn did depose and state:

1. That he makes this affidavit based upon his own personal knowledge and upon information known to him personally and obtained from documents contained in the files and records of Baheth entities, which documents are kept in the ordinary course of business and which are in his custody and control and that he is competent to testify with regards to the facts contained herein and the documents referred to.

2. That he is the President of Baheth, ET AL and individually he is currently and was so at all times relevant herein and is authorized to execute same.

3. That Mr. Christopher (Chris) Pope was the banker whom dealt with myself, individually and M.A. Baheth and Company, Inc., while branch manager at American Bank and Trust Company, now Hancock Bank during 1982 and 1983.

4. That Mr. Chris Pope was the banker whom dealt with Baheth entities and myself, individually at "Guaranty Bank and Trust Company", now "Regions Bank" from 1983 to 1993.

5. That Baheth entities and myself, individually became a customer with Mr. Chris Pope of American Bank upon referral of Mr. Ricky Chutz, branch manager for "American Bank, North Park Branch", now "Hancock Bank".

6. That Baheth entities and myself, individually became a customer of "Guaranty Bank" now "Regions Bank" when Mr. Chris Pope transferred to "Guaranty" now "Regions" in 1983, after informing me of the transfer of which Baheth set up accounts and made loans from the "Guaranty" now "Regions" and paid off loans at "American Bank" now "Hancock Bank".

7. That a long uninterrupted unattested **[(approximately ten (10) years - (from 1983 to 1993)]** and satisfactory banking relationship co-existed between myself and the Baheth entities and Mr. Chris Pope and "Guaranty Bank" now "Regions Bank".

8. That a personal business relationship and an obligation of trust was established and developed between Mr. Chris Pope of "Guaranty Bank" now "Regions Bank" and myself and the Baheth entities over this ten (10) year period of doing business.

9. That I completely trusted Mr. Chris Pope in all banking and business matters.

10. That regarding myself and Baheth entities, several business decisions were made by Mr. Chris Pope and upon advice to me was enacted, such as; the forming of "M.A. Baheth Construction Company, Inc." and The Baheth Corporation, of which; the Construction Company was formed to provide construction services in order to relieve M.A. Baheth and Company, Inc., of it's 1984, financial woes and allow it to revive itself by loaning M.A. Baheth and Company, Inc., funds from the Construction Company's profits to pay and meet its obligations during the 1984, valley period. The Baheth Corporation was formed at the time to purchase property and equipment (heavy and light) to lease and sell for profits, which it did.

11. That Mr. Chris Pope advised me to deal with Attorney W. Steven Mannear - Guaranty Bank's attorney in the aforementioned matters listed in item 10.

12. That it was also advised by Mr. Chris Pope that Attorney W. Steven Mannear co-sign on a loan, at Guaranty Bank, to establish a small line of credit to support M.A. Baheth Construction Company. Inc., which was formed in 1986, and incorporated by Attorney W. Steven Mannear.

13. That Mr. Chris Pope had the freedom to communicate and correspond with others regarding Baheth entities and myself, individually and in business matters.

14. That Mr. Chris Pope had the authority to pay sub-contractors on behalf of myself and to pay on loans of Baheth entities by disbursing its' funds it received from clients by means of inner-banking transactions to itself by an account set up by Mr. Chris Pope at "Guaranty Bank" now "Regions Bank".

15. That I had the cash to purchase the 32 acre tract of land on Blackwater but at the advise of Mr. Chris Pope it was financed by "Guaranty Bank" now Regions Bank" in 1989, and refinanced in 1990, upon combining the purchase of ten (10) additional acres.

16. That it was the intent of The Baheth Corporation to develop a subdivision on the now forty (40) acres of land purchased on Blackwater which "Guaranty" now Regions" foreclosed.

17. That the original note of Bakan Ltd., — was $158,000.00 and not $235,000.00 as alleged by Mr. Chris Pope.

18. That the renovation that took place on the property purchased by Bakan, Ltd. was completed prior the signing of the original loan of $158,000.00 which was executed on March 6, 1992.

19. That the difference between the alleged $158,000 and the $235,000 which calculates a difference of $77,000, was not receive by me on May 12, 1992.

20. That the second floor of the house purchased by Bakan, Ltd. on March 6, 1992 was a part of the original structure and not an addition as alleged by Mr. Pope in his deposition.

21. That I contacted Mr. Chris Pope on or about early April, 1992, about a loan for operating capital for M.A. Baheth Construction Company, Inc. Mr. Pope ask me to bring a copy of the matrix containing the current billings (approved invoices showing a copy of the receivables which were approxamately $1.9 million dollars.

22. That Mr. Pope with reference to item 18 (above) informed me that *"I'll work something out; give me a few days to see what I can do"* — as he had done many times over the years, as acknowledged in several character letters to various Baheth entities clients.

23. That I met with Mr. Chris Pope at his office on Florida Blvd., about four (4) weeks (after my initial contact with Mr. Chris Pope in early April) on May 12, 1992, as per his instructions with the understanding that I would be signing a loan

documents to receive funds for operating capital, as was done many times in the past.

24. That I was called in by Mr. Chris Pope to sign numerous documents on May 12, 1992, at the request of Mr. Chris Pope, via Mr. Charles Castracane — (a Baheth employee).

25. That I was told by Mr. Chris Pope that the signing of *"all these documents was only to make the bank feel comfortable"*.

26. That on May 12, 1992, I informed Mr. Chris Pope that the laboratory equipment was not owned by BEAL, however; Mr. Chris Pope again instructed that the signing of *"these documents are necessary to make the bank feel comfortable"*.

27. That the documents that I signed on May 12, were presented by Mr. Chris Pope in the office of Mr. Chris Pope on Florida Blvd., and not Mr. Frank Clark as alleged in the deposition of Mr. Chris Pope.

28. That I was not aware of what I was signing, in most cases only the signature page was presented and there was no notary present during the signing of the documents of May 12, 1992, as later shown on the documents of record.

29. That funds from loans that were alleged to have taken place on May 12, 1992, were not received as stated in the Affidavit of Mr. Chris Pope.

30. That I met with Mr. Chris Pope in mid 1992, to discuss liquidating the CD and the CD was liguidated by Mr. Chris Pope to be applied to the various notes to pay them years in advance as per my instructions and our understanding — this was not done.

31. That I did not negotiate the restructures, refinancing or new loans on behalf of myself, individually or on behalf of any Baheth entity, on May 12, 1992 — as stated in the Affidavits of Mr. Chris Pope in the law suits which resulted in summary

judgments and foreclosure actions on property and automobiles owned by Baheth entities — (some with zero (0) balances) as now acknowledged by "Guaranty Bank" now "Regions Bank".

32. That letters of credit were redeemed by bonding companies which maxed out the line of credit of M.A. Baheth Construciton Company. Inc.

33. That approximately $300,000.00 was received by "Guaranty Bank" now "Regions Bank" on behalf of M.A. Baheth Construction Company, Inc. from the bonding companies and a credit of receipt has not been posted to this date.

34. That "Guaranty Bank" now "Regions Bank" have gotten summery judgments on several Baheth entities plus attorney fees in excess of 3.5 million dollars on false affidavits.

35. That I never contacted or dealt with Mr. Frank Clark on any banking matters.

36. That I was referred to Attorney Paul Hebert of Breazeale, Sachse & Wilson by Mr. Chris Pope and was advised to get legal representation with Attorney Paul Hebert on other company matters.

37. That the law firm of Breazeale, Sachse & Wilson formed the corporation Bakan Ltd., a Baheth owned entity at the time of inception.

38. That several attempts were made by myself to get amortized records of all loans showing payment histories of all loans of Baheth entities from "Guaranty Bank" now "Regions Bank" over the years, However; Mr. Chris Pope led me to believe that everything was always alright.

39. That Attorney Carl Perkins made several attempts by letter to Attorney Stephen Chiccarilli of Breazeale, Sachse & Wilson to get amortized records of all loans associated with The Baheth Corporation and Bakan Ltd.

40. That these loans histories were not received until September 1994, from Ms. Samara Abide a trustee in a bankruptcy matter from Attorney Stephen Chiccarilli of Breazeale, Sachse & Wilson.

41. That Mr. Chiccarilli responded falsely to Mr. Perkins request for amortization of loans histories on Baheth entities, knowing that this information was in Mr. Chiccarilli possession, which was learned later after submitting the information to Ms. Abide on October 17, 1994, via facsimile.

42. That I met with Mr. Chris Pope again in March of 1993, to discuss the Formosa trial outcome as follows:

(a) That the details of the case could not be discussed as per Judge Sam Kent's orders in chambers, however; there was no admission of guilt.

(b) That funds and/or proceeds as per agreement would be placed in the registry of the court to be disbursed as the result of an interpleader action.

(c) That I was advised by Mr. Chris Pope to relieve his attorneys involved and that he would get Attorney Paul Hebert of Breazeale, Sachse & Wilson to proceed in representing "Guaranty Bank" now "Regions Bank" and M.A. Baheth Construction Company's interest in this interpleader action and requested that I pledge all receivables gained to "Guaranty" now "Regions".

43. That every company listed on the interpleader action received funds with the exception of M.A. Baheth Construction Company due to the lack of the legal representation that was installed by Mr. Chris Pope on behalf of M.A. Baheth Construction Company and "Guaranty Bank" now "Regions Bank" as advised by Mr. Chris Pope.

44. That on the same day as the aforementioned in Item 20, Mr. Chris Pope suggested that the four hundred (400) Shares of EXXON Stock be liquidated and again distributed as payments on the alleged various loans, and it was done.

45. That it was my understanding that liquidating the EXXON Stock would again pay the various notes to August of 1993, making payments not due until August or September.

46. That in August of 1993, I contacted Mr. Chris Pope to pay the notes and Mr. Chris Pope agreed to accept at the "Guaranty " now "Regions" Florida street branch.

47. That on August 20, 1993, a letter was received dated August 18, from Mr. Frank Clark of "Guaranty Bank" now Regions Bank" returning the check previously received by Mr. Chris Pope along with a workout arrangement.

48. That on August 23, 1993, I responded by letter to Mr. Frank Clark rejecting his workout arrangement and explaining the workout agreement accepted by Mr. Chris Pope.

49. That my letter to Mr. Frank Clark refutes the allegations in the second (2nd) paragraph of the demand letter of "Guaranty Bank" now "Regions Bank" dated October 11, 1993.

50. That Mr. Chris Pope contacted me via telephone and declared that he was back in the loop and that he would accept the September payment previously rejected by Mr. Frank Clark and the check can be returned to the bank branch on Florida and Cora Street.

51. That on September 23, 1993, City National Bank of Baton Rouge, Louisiana honored the check comprising of payments on the various Baheth notes which was not credited to any of the Baheth notes.

52. That I was lead to believe that all alleged loans were paid up to date as late as January 1994, as a result of having re-

ceived the final disbursement from the US Army Corps of Engineers of which "Guaranty" now "Regions" made a check payable to itself by Mr. Chris Pope.

53. That there exist no credit of the aforementioned check being applied to any of Baheth's entities loans.

54. That I was lead to believe by Mr. Chris Pope that all notes alleged were current and that the status quo was of no moment, in that; character letters were faxed and mailed to various clients of mine upon my request of Mr. Chris Pope as late of July 20, 1993, several months after "Guaranty Bank" now "Regions Bank" alleged default on notes in January or February 1993.

55. That all Baheth entities were seperate individual corporations each having its own designated corporate books, accounts, records and tax numbers

56. That the law firm of Breazeale, Sachse & Wilson which represented M.A. Baheth, individually and Baheth entities at the advice of Mr. Chris Pope is the same law firm that was ordered by Mr. Chris Pope to file suits causing the demise of all the Baheth entities.

Sworn to and subscribed before me, Notary, and the undersigned competent witnesses on the 16th day of August, 1995, Baton Rouge, Louisiana.

WITNESSES:

s/ M.A. BAHETH
M.A. BAHETH, INDIVIDUALLY
BAHETH, ET AL
M.A BAHETH, PRESIDENT
NOTARY PUBLIC

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

M.A. BAHETH A/K/A,	*
M. ALLAM BAHETH; BAHETH	*
RESEARCH & DEVELOPMENT	*
LAB., & BAHETH ENVIRONMENTAL &	*
ANALYTICAL TESTING LAB., LTD.	**CASE NO. 95-96-B-1**
AND M.A. BAHETH & CO., INC.	*
	*
	COMPLAINT
	*
VERSUS	*
	*
GUARANTY BANK AND TRUST CO.,	*
NOW KNOWN AS REGIONS BANK;	*
CHUCK DABIDIE; CHRIS POPE	*
AND FRANK CLARK	* * * * * * *

The complaint of M.A. Baheth A/K/A, M. Allam Baheth; Baheth Research & Development Lab., and Baheth Environmental & Analytical Testing Lab., Ltd. And M. A. Baheth & Company Inc., state as follows:

JURISDICTION AND VENUE

I.

A. M. A. Baheth, A/K/A. M. Allam, Baheth Research & Development Lab., Inc. And Baheth Environmental and Analytical Testing Lab., Ltd, and M. A. Baheth & Co. Inc. (Plaintiffs'), institute these proceeding and invoke the jurisdiction of this court under 12 U.S.C. Section 1975.

B. This court also has jurisdiction of this action under 28

U.S.C. Section 1367, in that other claims are related to the claims within the original jurisdiction that they form part of the case or controversy.

PARTIES

A. Petitioner, M.A. Baheth, A/K/A, M. Allam Baheth, is a citizen of the United States of America and at all times relevant herein domiciled in the Parish of East Baton Rouge, State of Louisiana.

B. Petitioner, Baheth Research & Development Lab., Inc., is a domestic corporation, with its principle place of business in the Parish of East Baton Rouge, State of Louisiana.

C. Petitioner, Baheth Environmental & Analytical Testing Lab., is a domestic Corporation organized under the laws of the State of Louisiana with its principle place of business in the Parish of East Baton Rouge.

D. M.A. Baheth & Company, Inc., is a domestic corporation organized under the laws of the State of Louisiana with its principle place of business in the Parish of East Baton Rouge.

E. Defendant, Guaranty Bank and Trust Company, now known as Regions Bank was a national bank organized pursuant to the laws of the State of Louisiana, then with its main office and principal headquarters in the Parish of East Baton Rouge.

F. Defendant, Chuck Dabidie, is an individual domiciled in the Parish of East Baton Rouge, State of Louisiana, and was at all time relevant acting within the course and cope of his official capacity as president of the defendant, Guaranty Bank & Trust Co., now known as Regions Bank.

G. Defendant, Chris Pope, is an individual domiciled in the Parish of East Baton Rouge, State of Louisiana, and was at all time relevant acting within the course and scope of his official

capacity as a senior vice president of the defendant, Guaranty Bank & Trust Co., now known as Regions Bank, liable pursuant to the doctrine of respondent superior.

H. Defendant, Frank Clark, is an individual domiciled in the Parish of East Baton Rouge, State of Louisiana, and was at all time relevant acting within the course and scope of his official capacity as a senior vice president of the defendant, Guaranty Bank & Trust Co., now known as Regions Bank, liable pursuant to the doctrine of respondeat superior

FIRST CLAIM FOR RELIEF—VIOLATION OF THE BANK TYING ACT

1.

During completion of a project at Formosa Plastic, Texas. Mr. Pope agreed to extend the loan, Mr. Baheth signed what he believed was a promissory note for a loan of $235,000 for operating capital. However, it was learned later that the document was used as a scheme by Guaranty where it appears that guaranty paid off the note on residential property located on Sherwood Forest Boulevard, which was then approximately, $135, 000.00, tying the $235,000.00 it alleges was the original amount of the loan on the residential property. Guaranty used the $235,000.00 debt to increase the debt on the residential property which it used to foreclose on that property alleging that it had loaned an original amount of $235,000 for the property. Mr. Baheth was never extended a loan for operating capital in the amount of $235, 000, nor did he receive the difference in the amount Guaranty alleges it loaned and used to payoff the debt on the residential property on Sherwood Forest Boulevard, which was used as collateral on the alleged loan.

2.

On or about May 12, 1992 Guaranty Bank & Trust Co., now known as Regions Bank, ("Guaranty"), required M.A. Ba-

heth & Co., Inc., to assume the debt of the M.A. Baheth Construction Co., Inc., Mr. M. A. Baheth was coerced into signing continuing guaranties and commercial guaranties on behalf of every company he was associated with, even corporations he did not own, this was in addition to pledge of receivable and personal stock and certificates of deposit which were used as additional security for the line of credit for the Construction companyís debt and the alleged loan for $235,000.00.

3.

That Guaranty fraudulently concealed this wrongful act, which the petitioners could not and did not discover until suits were filed by Guaranty on the alleged continuing guaranties and commercial guaranties and alleged cross-collaterization about November, 1993.

SECOND CLAIM FOR RELIEF—BREACH OF FIDUCIARY DUTY

4.

The allegations of paragraphs 1 through 3 are hereby realleged and incorporated herein.

5.

Since early 1980, M.A. Baheth personally and as president of M.A. Baheth & Company, Inc., established a banking relationship with senior Vice President, Chris Pope, who was then loan officer at American Bank & Trust Co., now known as Hancock Bank.

6.

To the best of his ability, plaintiffs aver that Mr. Pope left American Bank about 1983 for employment with Guaranty Bank.

7.

After the move to Guaranty Bank, Mr. Pope informed Mr.

Baheth that he had taken his account with him. Mr. Pope established new checking and savings accounts for M.A. Baheth, personally and on behalf of M. A. Baheth & Co., Inc.

8.

During 1986, Mr. Pope advised Mr. Baheth to establish another corporation and referred him to one of the bank's attorneys, W. Steven Mannear, to incorporate, M.A. Baheth Construction co., Inc., and the Baheth Corporation about May 1986.

9.

After incorporation of M.A. Baheth Construction Co., Inc., and The Baheth Corporation, Inc., commercial accounts were opened by Mr. Pope at Guaranty Bank, a line of credit of $25,0000.00 was established for the construction company.

10.

M.A. Baheth was required to pledge Governmental contracts of over $4 million dollars for the line of credit referred to above.

11.

During the period from 1988 to 1989, the bank had extended the credit line to upwards of $400,000.00 on behalf of M.A. Baheth Construction Co., Inc.

12.

During 1989, The Baheth Corporation, Inc., purchased 32 acres of undeveloped land in East Baton Rouge Parish. Mr. Baheth, on behalf of the corporation was prepared to pay cash for the purchase, however upon advise from Mr. Pope, the bank financed the purchase and the money was used to purchase a $30,000.00 certificate of deposit with Guaranty bank and the remainder used as operating capital.

13.

In 1980, The Baheth Corporation purchased an additional 10 acres of undeveloped land, which again the bank financed.

14.

During the banking relationship between Mr. Baheth and the other entities , Guaranty Bank financed vehicles and other equipment and supplies and used profits from M.A. Baheth Construction Co., Inc., to pay off the balances through inner-banking transactions, and loaned upward of $1.2 Million Dollars for operating expenses and for security backing performance and/or bid bonds.

15.

In March 1992, Bakan, Ltd., a corporation then owned by Mr. Baheth purchased a residential property located in the Parish of East Baton Rouge, State of Louisiana, on Sherwood Forest Blvd., which was purchased for the cash amount of $158,000.00. Bakan, Ltd., signed a promissory note for $158,000.00 and the residential property was used to secure the loan.

16.

On or about May 12, 1992, M.A. Baheth was called by Mr. Pope to come to the Bank to sign some documents. When Mr. Baheth inquired as to the nature of the document he was lead to believe that the documents were nothing important, it was just to make the bank feel comfortable. That by signing these documents, he would be able to lower his monthly payments and extend a loan of $200,000.00 for operating the construction company during difficult times with Formosa Plastics.

17.

On the date referred to above, Mr. Baheth was presented

with a stack of documents nearly 2 inches high and was instructed where to sign, the nature of the documents was not disclosed, nor was Mr. Baheth provided a copy of the documents.

18.

Between 1989 and 1993, Guaranty Bank received over $4.5 MILLION DOLLARS, from the construction company's St. Gabriel Levee Project, which ended in 1993. The Construction Co.'s profit of the money was $1,000,000.00, of which Guaranty Bank received 60% which was to be used to pay on various accounts.

19.

Mr. Pope made decisions as to where the moneys would or would not be applied and made the various payments through inner banking transactions.

20.

In 1989 and 1990, Guaranty Bank approved an increase in the line of credit for M.A. Baheth Construction Co., for the purpose of issuing letters of credit and redeeming them for personal indemnification for performance bonds on U.S. Department of Energy Projects.

21.

During 1990, American Bonding and Ocean Marine Indemnity bonding companies redeemed the letters of credits, resulting in over $300,000.00 against the letter of credit, drawn from the line of credit referred to above .

22.

Upon successful completion of the projects in 1992 and 1993, the bonding companies reimbursed M.A. Baheth Construction Co., Inc., the amount used against the letters of credit

for indemnification. The reimbursements were made out directly to Guaranty Bank on behalf of M. A. Baheth Construction Co., Inc., to be reapplied to the line of credit.

23.

On the May 12, 1992, referred to above, among the documents signed by Mr. Baheth was a document transferring the debt of M.A. Baheth Construction Company, Inc., to M.A. Baheth & Co., Inc., at the advise of Mr. Pope, with the suggestion that the Baheth Laboratories and M.A. Baheth & Co., Inc., would be able to aid in retiring M.A. Baheth Construction Co.'s debt.

24.

Near the middle of March 1993, Guaranty Bank liquidated 400 shares of Exxon stock issued to Mr. Baheth personally for the purpose of paying the notes in advance, through August, 1993. Upon information and belief Guaranty Bank has failed to provide proof as the where the moneys where applied.

25.

On or about April 6, 1993, M.A. Baheth Construction Co., Inc., was forced to file bankruptcy.

26.

On or about October 28, 1993, Guaranty filed suit for Executory Process to seize and sell the residential property, located on Sherwood Forest Blvd., the Parish of East Baton Rouge.

27.

About mid November, 1993, Guaranty Bank filed suit for Executory Process to seize and sell the 42 acres of undeveloped property.

28.

On or about mid November, 1993, Guaranty Bank filed suits against M.A. Baheth, Individually, Baheth Environmental & Testing Laboratory, Inc., Baheth Research & Development Lab., Inc., pursuant to the continuing guaranties and commercial guaranties signed May 12, 1992. Guaranty Bank also alleged that all of the various companies were cross-collaterized because of the documents Mr. Baheth signed, May 12, 1992.

29.

Guaranty Bank obtained Summary Judgments against M.A. Baheth, Individually, Baheth Environmental & Testing Lab., Inc., and Baheth Research & Development Lab., Inc., for the full amount of the alleged guaranties, seized vehicles with zero ($0), balances and sold then at sheriffís sale, have seized real estate property, and continued to attempt execution on the full amount of the judgments.

30.

That prior to the foreclosure and seizure and sales herein, Mr. Pope was in control of the funds assigned on behalf of the Construction Company and Mr. Pope made the decisions regarding where the Moneys were to be applied.

THIRD CLAIM FOR RELIEF—FRAUD AND MISREPRESENTATION

31.

The allegations of paragraphs 1 through 30 are hereby realleged and incorporated herein.

32.

Guaranty Bank and Mr. Pope committed fraud by the following non-exclusive acts:

A) In October 1993, Mr. Pope represented to Mr. Baheth that the various notes were paid in advance to February 1994.

B) Mr. Pope knew when he made the representation that it was false.

C) When Mr. Pope made the representations he knew it was false.

D) Mr. Pope made the representation with the expectation that Mr. Baheth should act upon said representation.

E) Mr. Baheth acted in reliance upon Mr. Pope' representations.

F) That as a result, Mr. Baheth, Individually and the corporations he represents have suffered injury.

33.

During the time Mr. Baheth was attempting to renegotiate the credit arrangements with Guaranty Bank, Guaranty Bank was embarking on a strategy to disengage itself from the borrowers' current existing credit arrangement.

34.

At the same time that Mr. Baheth was negotiating with Guaranty Bank it was in the process of securing a judgment against two of the entities The Baheth Corporation and Bakan, Ltd. Mr. Baheth was coerced into signing commercial and continuing guaranties of the entities which judgments were rendered by Executory Process on October 28, 1993.

FOURTH CLAIM FOR RELIEF—NEGLIGENT ADMINISTRATION OF LOANS

35.

The allegations of paragraphs 1 through 34 are hereby realleged and incorporated herein.

36.

That the special relationship that existed between Mr. Baheth and Mr. Pope created a fiduciary duty on the part of the defendants, Mr. Pope and Guaranty Bank, which they

breached by wrongful concealment of their intention to use the documents signed by Mr. Baheth on May 12, 1992 as the basis for suits against all the entities Mr. Baheth was associated.

FIFTH CLAIM FOR RELIEF—INTENTIONAL INFLICTION OF EMOTIONS DISTRESS

37.

The allegations of paragraphs 1 through 36 are hereby realleged and incorporated herein.

38.

The conduct of defendants resulted in the intentional infliction of emotional distress upon the plaintiffs.

FIFTH CLAIM FOR RELIEF—FRAUDULENT NONDISCLOSURE

39.

The allegations of paragraphs 1 through 38 are hereby realleged and incorporated herein.

DAMAGES

40.

That by reason of violation of Section 1972 of Title 12, plaintiffs are entitled to recover three times the amount of damages sustained, and cost of suit, including reasonable attorney's fee, as mandated by Section 1975.

41.

That by reason of the conduct set forth above and made by the defendants, the plaintiffs lost their life savings, past and future investments, past and future income, suffered damage to their professional and personal reputation, suffered emotional distress, suffered damage to their banking relationship with Guaranty Bank and other lending institutions, and ultimately

bankrupted three companies, suffered many unjustified law suits and judgments, all their damages in the amount of about TWENTY MILLION DOLLARS.

42.

That the actions of the defendants were willful, malicious, and/or committed with reckless disregard of the consequences, thereby justifying an award of punitive damages against the defendants in the amount of FORTY MILLION DOLLARS.

43.

Plaintiffs are entitled to and desires trial by jury.

WHEREFORE, plaintiffs pray that this court enter judgment as follows:

1. Assume jurisdiction over this action.
2. Award plaintiff compensatory damages against the defendants in the amount of TWENTY MILLION DOLLARS.
3. Award plaintiffs treble statutory damages against the defendants;
4. Award plaintiffs punitive damages against the defendants in the amount of FORTY MILLION DOLLARS.
5. Award the plaintiffs costs of this action, together with attorney's fees and prejudgment interest;
6. Grant plaintiffs' demand for trial by jury; and
7. Award such other relief as the court deems proper and equitable

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Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-1096

In The

Supreme Court of the United States

October Term, 1996

M.A. BAHETH A/K/A M. ALLAM BAHETH; BAHETH RESEARCH & DEVELOPMENT LAB., AND BAHETH ENVIRONMENTAL & ANALYTICAL TESTING LAB., LTD. AND M.A. BAHETH & CO., INC.,

Petitioners,

versus

GUARANTY BANK AND TRUST COMPANY, NOW KNOWN AS REGIONS BANK; CHUCK DABADIE; CHRIS POPE AND FRANK CLARK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny this Petition for Writ of Certiorari for the following reasons:

STATEMENT OF THE CASE

Petitioners seek review by this Court of a decision by the United States Court of Appeals for the Fifth Circuit that affirmed a decision by the United States District Court for the Middle District of Louisiana. The trial court dismissed Petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6). The complaint attempted to state six claims for relief, including a single federal claim based upon alleged violations of the Bank Tying Act (12 U.S.C. § 1971, *et seq.*). In affirming the lower court's dismissal, the Fifth Circuit held, in a one paragraph unreported decision, that (a) the district court did not commit reversible error in dismissing the federal claim (adopting "essentially" the reasons of the magistrate judge, which were also adopted by the district court); and (b) appellants abandoned all state law claims when they failed to challenge the district court's alternative basis for dismissal, *i.e.*, discretionary declination of supplemental jurisdiction, 28 U.S.C. § 1367(c).

Petitioners filed their complaint in January of 1995, seeking recovery against Guaranty Bank & Trust Company ("Guaranty") and certain individual officers (collectively "Respondents") in connection with an ongoing lending relationship with the Petitioners. The only allegation under the federal Bank Tying Act claim was that

Guaranty required additional security for its line of credit. On its face, the complaint was void of any allegation that the banking practices were unusual or were anything other than customary within the banking industry, a requisite to maintain a tying claim under 12 U.S.C. § 1972.

Once the federal claim fell, the district court properly exercised its discretionary authority to dismiss pendent state law claims.[1] Nevertheless, the court went on to find that the state law claims were time-barred under Louisiana law. The court rejected Petitioners' *contra non valentem* arguments,[2] based upon a review of the complaint. Paragraph 3 of the complaint acknowledges that the alleged wrongdoing could have been discovered by November of 1993, which is more than a year before Petitioners' suit was filed.

The only issue on appeal to the Fifth Circuit was whether the complaint, as amended, was sufficient to defeat dismissal. Appellants nevertheless concentrated on arguments not properly before the court on a motion to dismiss. Now, Petitioners have again failed to address the

---

[1] 28 U.S.C. § 1367(c)(3).

[2] Petitioners have argued at each stage of the proceeding thus far that Guaranty's "fraudulent or intentional concealment or misrepresentation" triggers the doctrine of *contra non valentem*. Under Louisiana law, the doctrine permits suspension of the running of prescription, *inter alia*, until such time as the other party is no longer prevented from exercising his or her rights by the defendant's conduct or until the cause of action becomes known or at least knowable. See La. Civ. Code art. 3467 and *Corsey v. State Dept. of Corrections*, 375 So. 2d 1319 (La. 1979).

issue at hand, which is whether this Court should grant this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

This petition does not warrant review by this Court. The decision by the Fifth Circuit is not in conflict with decisions of any other Court of Appeals or state court of last resort. Further, this petition does not pose an important question of federal law, as evidenced by the fact that the Petitioners do not argue that the Fifth Circuit's interpretation of the Bank Tying Act is inconsistent with the Act's language.

Respondents urge this Court not to waste its resources on a case that does not present any compelling reasons for review. Granting this writ application will have no impact on litigants in general and will not clarify the law on standards of review under Rule 12(b)(6), supplemental jurisdiction, or the requirements necessary to maintain a federal tying arrangement claim.

ARGUMENT

Respondents respectfully oppose this Petition for Writ of Certiorari based on its complete failure to adhere to the guidelines for granting writs as set forth in Rule 10 of the Supreme Court Rules. The review sought is a matter of judicial discretion and review by this Court should only be granted for compelling reasons. Respondents have failed to set forth any compelling reasons.

I. The Fifth Circuit's decision is not in conflict with other courts of appeal or state courts of last resort.

Petitioners have failed to allege, and indeed cannot allege, that a conflict exists among the courts of appeal sufficient to warrant review by this Court. Determining the adequacy of allegations in a complaint within the context of a Rule 12(b)(6) motion is not a subject matter ripe for this Court's discretionary consideration.

Certiorari jurisdiction is principally designed to resolve conflicts among circuit courts and various state courts on the meaning of provisions of federal law.[3] In *Braxton*, unlike the instant petition, this Court granted the petitioners' writ based upon disagreement among the circuit courts as to the meaning of certain language in the federal sentencing guidelines.[4] Moreover, *Braxton* addressed an important issue of national interest, with far reaching implications on courts throughout the nation desirous of achieving uniform sentencing standards.

Conversely, Petitioners seek review of the Fifth Circuit's ruling affirming the district court's determination that the complaint allegations were insufficient and the district court's interpretation of unambiguous language concerning supplemental jurisdiction with respect to state law claims.

Similarly, Petitioners have failed to identify any state court of last resort that has decided a Bank Tying Act issue in a manner conflicting with another state court of

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[3] See *e.g.*, *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

[4] U.S.S.G. § 1B1.2(a), 18 U.S.C.A. App.

last resort.[5] No one, other than the Petitioners, benefits if this petition is granted.

II. There is no important federal question at issue that requires a decision from this Court.

Petitioners concede that the standards for maintaining a tying claim are set forth appropriately by the Ninth Circuit in *Rae v. Union Bank*.[6] The issue before the court in *Rae, supra,* was virtually identical to the case at bar. In *Rae,* the plaintiff's complaint, as amended, named the bank and certain employees and alleged various contract and tort theories. The court dismissed the suit, initially on diversity grounds, and after amendment, under Rule 12(b)(6) based on plaintiff's failure to state a claim under the Bank Tying Act and its discretion with respect to pendent state law claims. As in the instant case, the complaint merely made reference to loan conditions and extensions of credit accompanied by provisions designed to protect the bank's security. The court concluded that such requirements were simply not enough to state a claim, noting that even though the complaint had been amended once already, there were no allegations that the banking practices at issue were unusual in the industry.[7]

Petitioners do not ask this Court to review the *Rae* decision in light of the decision by the Fifth Circuit in this case, nor do they assert that *Rae* was decided contrary to a previous decision of this Court. The absence of an

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[5] U.S. Sup. Ct. Rule 10(b), 28 U.S.C.A.

[6] 725 F.2d 478 (9th Cir. 1984).

[7] *Rae* at page 480.

argument in favor of review is telling. Interpretation of the Bank Tying Act is not at issue, but rather whether the allegations contained in the complaint are adequate to defeat dismissal. Assuming *arguendo* that the Bank Tying Act needs clarification, any clarification should arise from more compelling circumstances.

III. The Fifth Circuit's standard for review under Rule 12(b)(6) has not been challenged by Petitioners.

The petition does not allege that the standard for review applied by the Fifth Circuit is contrary to this Court's or other circuit courts' standards. The Report and Recommendation of the Magistrate Judge[8] includes a section devoted to the well-defined framework developed by the Fifth Circuit for treatment of motions to dismiss under 12(b)(6).[9] Here, the Fifth Circuit wholly adopted the magistrate's report, finding no reversible error. At least implicitly, the appellate court determined that the

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[8] See Petitioners' Appendix C, App. 5.

[9] See *e.g., Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (motions to dismiss for failure to state a claim upon which relief can be granted generally viewed with disfavor and rarely granted); *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995) (motion to dismiss for failure to state a claim admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts); and *Hirras v. National R.R. Passenger Corp.*, 10 F.3d 1142, 1145 (5th Cir. 1994) (complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief).

district court's ruling was consistent with its prior jurisprudence.[10]

To the contrary, Petitioners stubbornly insist that the lower courts erred in refusing to permit them an " . . . opportunity to have the complaint answer (*sic*), conduct discovery and offer evidence to support their claims."[11] That is not the standard courts employ on a 12(b)(6) motion to dismiss. The complaint, as amended, contains no allegations that the bank impermissibly benefitted from the cross-collateralization and additional guarantees that were executed to secure the various loans.

IV. The lower courts properly applied 28 U.S.C. § 1367 and Louisiana Civil Code article 3492 in dismissing Petitioner's pendent state law claims.

Petitioners have alleged in their complaint a single federal claim, based upon the Bank Tying Act. All remaining claims are state law claims dependent upon the court's supplemental jurisdiction. Petitioners fail to substantiate, and indeed have ignored the issue completely, why federal court jurisdiction should lie for the remaining state law claims. Declining to exercise supplemental jurisdiction is not only authorized by 28 U.S.C.

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[10] See footnote 9 above.

[11] See page 7 of Petitioner's Petition Writ for Certiorari.

§ 1367(c),[12] but was also encouraged by this court in *Gibbs*.[13]

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims *should* be dismissed as well. (Emphasis added).[14]

Moreover, as the Fifth Circuit ruled:

> Because appellants have failed to challenge the district court's alternative basis for the dismissal of the state law claims based on a discretionary declination of supplemental jurisdiction, these claims are considered abandoned.[15]

Petitioners have failed to address the abandonment or waiver issue with respect to the independent grounds for dismissal of all state law claims. The petition does not even hint at the possibility that the Fifth Circuit decided the abandonment issue inconsistently with other courts. Even if Petitioners had raised the issue, this Court does

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[12] 28 U.S.C. § 1367(c) provides in relevant part:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection(a) if –
>
> * * *
>
> 3. The district court has dismissed all claims over which it has original jurisdiction or . . .

[13] *United Mineworkers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966).

[14] 86 S. Ct. at 1139.

[15] Per curiam opinion of the Fifth Circuit, at Petitioners' Appendix A, App. 2, citing *Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir. 1990) *cert. denied*, 498 U.S. 966 (1990).

not normally consider issues that have not been presented to the Court of Appeals.[16]

The courts below also held that dismissal of all state laws claims under Rule 12(b)(6) was proper on prescription grounds. On the face of the complaint and the amended complaint, Petitioners allege that they could not and did not discover Guaranty's fraudulent concealment of its wrongful acts until suits were filed by Guaranty in November, 1993, to enforce the commercial guarantees and cross-collateralization agreements.[17] Petitioners' complaint followed more than one year later. The claims were appropriately dismissed because the district court held that all of the state claims sounded in tort[18] and thus were subject to the liberative prescriptive period of one year under La. Civ. Code art. 3492.

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[16] See, *e.g.*, *Neeley v. Martin K. Eby Const. Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L.Ed.2d 75 (1967) *rehearing denied*, 386 U.S. 1027, 87 S. Ct. 1366, 18 L.Ed.2d 471 (1967).

[17] See paragraph 3 of the complaint, at Petitioners' Appendix H, App. 33.

[18] See La. Civ. Code art. 2315 and F. Stone, *Louisiana Tort Doctrine*, § 229, Louisiana Civil Law Treatise, Vol. 12 (West Publishing Co. 1977).

CONCLUSION

For the reasons set forth hereinabove, the writ of certiorari should be denied.

Respectfully submitted,

PAUL M. HEBERT, JR.,
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